United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1815

To be argued by
JEFFREY I. GLEKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1815

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE W. HENDRICKS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

George W. Hendricks appeals from a judgment of conviction entered on June 4, 1974 in the United States District Court for the Southern District of New York after a three day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Information 74 Cr. 422, filed April 16, 1974, charged George W. Hendricks in three counts with possession of checks stolen from the mail in violation of Title 18, United States Code, Sections 1708 and 2.

Trial commenced on April 16, 1974 and concluded on April 19, 1974 when the jury found Hendricks guilty on all counts.

On June 4, 1974 Judge Ward sentenced Hendricks to concurrent terms of four months imprisonment on Counts One and Two and five years probation on Count Three to run consecutively to the terms of imprisonment. Hendricks is presently free on bond pending appeal.

Statement of Facts

The Government's Case

The Government established that during 1972 and 1973 Hendricks deposited $28,500 in welfare checks subsequently returned by the Department of Social Services as reported stolen; that Hendricks deposited at least fourteen of these checks within one to four days of the time they were mailed to recipients who never received them; that Hendricks continued to deposit welfare checks and withdraw their proceeds even after being warned by the bank manager and a postal investigator that some had been reported stolen; and that Hendricks attempted to mislead investigators by first claiming that he received the checks from his tenants, though he later insisted that he believed he was depositing legitimately obtained rent checks as a favor to two friends in the real estate business.

Walter J. Donahue, a branch manager of the Bankers Trust Company, testified that in May 1969, Hendricks opened a checking account at the 149th Street branch in the Bronx. In October 1972, Donahue stopped Hendricks on the floor of the bank and told him that payment had been stopped on a number of welfare checks deposited in his account. Hendricks explained that he was in the real estate business and his tenants "were trying to cause a problem for him" (Tr. 10-13).* Donahue also identified 56 welfare checks (GX 1-56)** which Hendricks deposited

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* "Tr." refers to the trial transcript.

** "GX" refers to Government's Exhibits.

on December 1, 1972, shortly after this conversation, six welfare checks deposited on March 2, 1973 (GX 58-64), and two checks deposited on October 10 and December 4 (GX 57, 58). All but one of these 64 checks were deposited between one and four days after issuance by the Department of Social Services (Tr. 13-16). Donahue further testified that in 1972 and 1973 a total of $28,500 in welfare checks deposited in Hendricks' account were returned to the bank as reported not received by the payees (Tr. 30-35).

Fourteen welfare recipients testified that they had failed to receive their welfare checks for December 1, 1972 and so notified the Department of Social Services. These were among the checks deposited by Hendricks in his account on December 1, 1972 (GX 26, 31, 39, 16, 32, 6, 22, 1, 33, 2, 14, 34, 25, 36). The payees testified that the endorsements on the checks were not in their handwriting and that they had not authorized anyone to sign the checks or to cash them. Five of the payees lived in city housing projects, four others always paid their rent by money order or in cash, and several recalled that their mail boxes had been broken into; none had ever met Hendricks or given him permission to deposit their checks (Tr. 40-92).*

Ellsworth Kearney, a Special Investigator for the Postal Inspection Service, testified that on March 26, 1973 he and a Postal Inspector visited Hendricks at his home and informed him that the Post Office was investigating as "stolen mail" the welfare checks deposited into his account. Hendricks first claimed the checks were "from tenants of his" but, when confronted by Kearney with the fact that the payees of the checks didn't know him, stated that he was "doing a favor for some guys" whose names he declined to give (Tr. 110-111, 121-122, 123, 127).

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* In addition, testimony by two payees that they failed to receive welfare checks deposited by Hendricks but not charged in the indictment was also admitted (Tr. 92-102) (GX 64, 65).

Kearney further testified that on May 16, 1973, when Hendricks was arrested and interviewed in the Postal Inspectors' office, he said for the first time that he deposited the checks as a favor to a Mr. Cohen, who was shot and killed around Christmas 1972, and later for a Mr. Rosen, who claimed to be Cohen's partner (Tr. 112). In an interview that same day at the offices of the United States Attorney, Hendricks said he owed Cohen $900 and in exchange for reductions in this debt deposited the checks for Cohen because there was "something wrong" with Cohen's account. After Cohen's death, Hendricks claimed to have continued the same arrangement with Rosen, whom he did not know how to contact because, he said, Rosen took the initiative in telephoning Hendricks whenever he had checks for deposit (Tr. 113-114). Hendricks also admitted that he withdrew $5,000 from his account shortly before the March 26 interview with the Postal Inspectors and turned the money over to Mr. Rosen after the interview, even though he had been told that the welfare checks had been stolen. In addition, he continued to withdraw sums of money from his account up until his arrest on May 16 (Tr. 114-115, 219-220).*

The Defendant's Case

Dorothy V. Hendricks, the defendant's wife, testified that since 1968 she and her husband had owned a building at 1227 Webster Avenue in the Bronx (Tr. 153);** in 1969 they purchased three other buildings. She testified that the family's economic situation had worsened between 1970 and 1972 because of destruction by fire of one of the build-

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* This activity was corroborated by Hendricks' bank statements for March 3 through May 2, 1973, showing a $5,000 withdrawal on March 23, a $3,000 withdrawal on March 27, and a $2,000 withdrawal on April 12. On March 16 there were deposits of $4,469.25 and $1,096.45 (Tr. 115-116) (GX 66, 67).

** This was the same street on which five of the check payees resided in city housing projects (Tr. 53-56, 71, 73, 78, 80, 90-92).

ings, loss of tenants, and costly repairs, and that from June 1972 until May 1973 she saw no large amount of money coming into the household (Tr. 154-157).

Hendricks testified that he had met Cohen while working as a contractor eight years ago (Tr. 166-167). Between February and March, 1972 he borrowed $2,000 from Cohen on a one year loan to pay taxes and make building repairs but fell behind in his monthly payments by June 1972 (168-169). Hendricks stated that Cohen asked him as a "favor" to deposit welfare checks through his account because Cohen's accounts were "tied up at the moment", that Cohen told him the checks were "from his tenants, or the building he managed" (Tr. 170, 211-212), and that in exchange he was allowed small reductions in his debt (Tr. 182, 225). The amount of welfare checks given to him for deposit by Cohen jumped from $800 for July, August, and September to $2,800 in October, but Cohen simply told him he needed the money for "personal use" (Tr. 178-180).

Hendricks stated that in December 1972, he had $2,800 in checks returned by the Department of Social Services, went to Cohen for an explanation, and accepted Cohen's repetition of the story that they were from tenants who falsely reported them stolen (Tr. 183). Even after the visit by the postal inspectors to his home on March 26, Hendricks testified, he thought "nothing was wrong" with the checks he had deposited (Tr. 199). He recalled subsequently delivering $10,000 in proceeds from the checks to Rosen (Tr. 218-220).

Hendricks further testified that after Cohen's death in December 1972, he was visited by Rosen and accepted Rosen's representation that he had to continue payments on the Cohen debt because Rosen "had a fair knowledge of the balance and the apartments" and hence seemed to be Cohen's partner (Tr. 184-185). At some point after Christmas, Hendricks went to Rosen to inquire again about the

checks because he "thought they may have been stolen checks because they were such a large amount". He testified that he again accepted the same explanation (Tr. 187-188).

Hendricks also stated that he was familiar with the neighborhood near his property on Morris Avenue (Tr. 200), the street on which five of the check payees lived in municipal housing projects, but believed all the checks, amounting to $30,000 or $40,000 for 1972 and 1973, were rent checks from buildings owned or managed by Cohen or Rosen (Tr. 201, 203, 204, 208). Hendricks said he did not notice the great number of different addresses printed on the front of each of the checks (Tr. 208).

ARGUMENT

The Court's charge on aiding and abetting was complete and proper.

The only contention presented by Hendricks is that the Court failed to charge that guilty knowledge was an essential element of the crime of aiding and abetting. Hendricks argues that Judge Ward's charge permitted the jury to convict him of aiding and abetting a stolen welfare check scheme without finding that he knew the welfare checks had been stolen. This characterization of the trial court's charge is based on a distorted reading and is without merit.

The first portion of Judge Ward's charge to the jury focused on the elements of Section 1708. Part of these instructions involved the issue of guilty knowledge:

> "We are not concerned *in this indictment* with who stole the mail, nor are we concerned with who stole the checks. Our only concern is whether the defendant possessed the checks *with the knowledge that they were stolen.*
>
> * * * * *

> In order to convict the defendant, you must also find beyond a reasonable doubt that the defendant's alleged possession of the stolen checks was committed unlawfully, willfully and knowingly. What do these terms, unlawfully, willfully, and knowingly mean? An act is done knowingly if it is done voluntarily and intentionally and not because of mistake, ignorance or accident. *The purpose of adding the word 'knowingly' is to insure that no one is convicted for an act done because of mistake, ignorance or other innocent reason . . .*" (Tr. 280). (emphasis supplied.)

Judge Ward then charged the jury on aiding and abetting. His instructions on aiding and abetting followed the standard charge propounded by Judge Learned Hand in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) and adopted by the Supreme Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). Judge Ward stated:

> To determine whether a defendant aided and abetted in the commission of an offense, you will ask yourself these questions:
>
> Did he associate himself with the venture?
>
> Did he participate in it as something he wished to bring about?
>
> Did he seek by his acts to make it succeed?
>
> If he did, then he is an aider and abettor (Tr. 285).

After the jury had deliberated for several hours the court delivered a supplementary charge:

> Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime, a person must associate himself with the criminal venture, participate in it, and try to make it succeed (Tr. 327).

The very language of these instructions speaks not merely of guilty knowledge, but of actually having as one's *purpose* the advancement of the crime. "Did he participate in it *as something he wished to bring about*?" and "[d]id he *seek* by his acts to make it succeed?" (Tr. 285, emphasis added). It was thus perfectly clear that Hendricks could not be convicted as an aider and abettor unless he was aware of the facts—in this case that the welfare checks had been stolen—which made the enterprise he furthered a crime. As the Court stated in its supplementary charge, in order to be an aider and abettor a defendant "must associate himself with the *criminal venture* . . . and try to make it succeed" (Tr. 327) (emphasis added).

This Court has squarely held that the *Peoni* charge on aiding and abetting adequately explains the requirement for proof of a defendant's criminal intent, which, of course, includes guilty knowledge. *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967);* *United States* v. *Barash*, 412 F.2d 26, 33 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969). The substance of the trial court's charge on aiding and abetting has also found recent approval in other Circuits. *Bailey* v. *United States*, 416 F.2d 1110, 1113 (D.C. Cir. 1969); *United States* v. *Driscoll*, 449 F.2d 894, 896 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972); *United States* v. *Barber*, 429 F.2d

* The court observed that the charge "followed the standard laid down in *Nye & Nissen* v. *United States*, quoting L. Hand J., in *United States* v. *Peoni*, that the defendant 'in some sort associate himself with the venture, that he participated in it as something he wished to bring about, that he seek by his action to make it succeed.'" 368 F.2d at 727-728 (citations omitted). *Cf. United States* v. *Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972); *United States* v. *Cassino*, 467 F.2d 610, 619 n. 19 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

1394, 1397 (3d Cir. 1970); *Moore* v. *United States*, 356 F.2d 39, 43 (5th Cir. 1966); *United States* v. *Bradley*, 421 F.2d 924, 927 (6th Cir. 1970); Seventh Circuit Judicial Conference Committee on Jury Instructions, Jury Instructions in Federal Criminal Cases § 3.03, 33 F.R.D. 523, 544 (1963); *United States* v. *Jackson*, 482 F.2d 1264, 1267 (8th Cir. 1973); *Grant* v. *United States*, 291 F.2d 746, 748 (9th Cir. 1961). *cert. denied*, 368 U.S. 999 (1962); *Roth* v. *United States*, 339 F.2d 863, 865 (10th Cir. 1964). It is not necessary to reiterate as part of the aiding, and abetting instructions a charge on guilty knowledge when, as here, guilty knowledge has been earlier charged as an element of the crime. *United States* v. *Bickford*, 445 F.2d 829 (1st Cir. 1971). See also *United States* v. *Barash*, *supra*, 412 F.2d at 33.

Moreover, the only instance in which this Court has required further elaboration of the *Peoni* formulation has been when evidence of participation in the offense by the alleged aider and abettor was slight. *United States* v. *Terrell*, 474 F.2d 872, 875-876 (2d Cir. 1973). Even if similar elaboration ought to be required when evidence of guilty knowledge is slight, that issue is not presented here, for the evidence of Hendricks' guilty knowledge was overwhelming. Hendricks had lied about the reason he possessed the checks when the manager of his bank told him they were bouncing. Thereafter he continued to deposit stolen checks in his account. Six months later Hendricks lied again to Postal Service investigators who advised him that they were investigating the theft from the mails of checks that were being deposited in his bank account. His final version of the facts, given at the time of arrest and later at trial, was that he had been depositing the checks in his account first at the behest of Cohen, a friend since deceased, and thereafter at the request of Rosen, who claimed to be Cohen's partner and for whom Hendricks cashed thousands of dollars in checks without knowing

either his address or telephone number.* He even claimed that he continued to think there was nothing wrong with the checks even after the visit from the Postal Service authorities.**

Furthermore, the context in which the charge was delivered eliminates the possibility that the jury could have overlooked knowledge as an element of aiding and abetting. The sole issue in dispute at trial, as Hendricks himself acknowledges, was whether the defendant knew the checks were stolen (Appellant's Brief at 15). The opening and closing statements of both the defense and prosecution singled out the question of knowledge as the critical issue (Tr. 8, 6, 245, 254). The trial court's marshalling of the evidence emphasized the issue of knowledge by summarizing Hendricks' early attempts to explain his role in the check cashing operation to the bank manager (Tr. 291, 301-302) and to Postal Investigator Kearney (Tr. 293-295) and

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* Needless to say, no evidence of the existence of Rosen was offered by the defense beyond Hendricks' testimony.

** None of the cases cited by Hendricks support his contention that the Court's charge on aiding and abetting was deficient. In *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972); *United States* v. *Jones*, 308 F.2d 26 (2d Cir. 1962) (*en banc*); and *United States* v. *Turnipseed*, 272 F.2d 106 (7th Cir. 1959), the convictions were reversed because of insufficient evidence as to guilty knowledge, not because of any defect in the charge. *Jones* and *Turnipseed* were tried by judges sitting without a jury. In *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962), this Court found the use of the standard aiding and abetting charge unobjectionable. Error lay only in additional extended comment on the evidence and posing of hypothetical cases by the trial court that may have implied that presence and knowledge alone, without purposive participation, could constitute aiding and abetting. 310 F.2d at 254. Despite the Judge's misleading comments in *Garguilo*, the Court held that reversal was justified only because the evidence was extremely slim, passing the test of sufficiency "only by a hair's breadth," 310 F.2d at 254. Here, the evidence that Hendricks knew the welfare checks had been stolen was overwhelming.

Hendricks' account at trial of his failure to notice the addresses of check payees living in city housing projects with which he was familiar and of his purported arrangement with Mr. Cohen and Mr. Rosen (Tr. 298-299, 360). In addition, no juror could have interpreted Judge Ward's instruction on the importance of guilty knowledge and his explanation of the use of circumstantial evidence to infer its existence, which included evidentiary rules regarding similar acts and false exculpatory statements (Tr. 280-285), as applying only to Hendricks' conviction as a principal. See *United States* v. *Gottlieb*, 493 F.2d 987, 994-995 (2d Cir. 1974). With the charge and the entire trial thus focused on the question of whether Hendricks knew that the checks were stolen, there can be little doubt, even absent the court's fully adequate charge, that the jury realized that Hendricks could not be convicted of aiding and abetting in the absence of guilty knowledge. See *Jones* v. *United States*, 404 F.2d 212 (D.C. Cir. 1968); *United States* v. *Ramsey*, 374 F.2d 192, 195-196 (2d Cir. 1967). *Cf. United States* v. *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *United States* v. *Shelvy*, 458 F.2d 823 (D.C. Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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